

Editor's note: 80 I.D. 395; Text ammended to reflect errata noted in 80 I.D. p. IV.

ARTHUR E. MEINHART
IRWIN RUBENSTEIN

IBLA 71-106

Decided June 12, 1973

Appeal from decision of Colorado State Office, Bureau of Land Management, dismissing protest and rejecting noncompetitive acquired lands oil and gas lease offer C 11726.

Affirmed.

Oil and Gas Leases: Acquired Lands Leases--Oil and Gas Leases: Applications: Generally--Mineral Leasing Act for Acquired Lands: Generally

The regulatory requirement that an acquired lands oil and gas lease offer must be accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease is satisfied by a statement to the effect that the offeror does not own an oil and gas lease on any part of the lands in question.

Merwin E. Liss, Cumberland & Allegheny Gas Company, 67 I.D. 385 (1960), is overruled.

APPEARANCES: Arthur E. Meinhart and Irwin Rubenstein, each pro se.

OPINION BY MR. HENRIQUES

Acquired lands oil and gas lease offers C 11703 and C 11726 for identical lands 1/ were filed simultaneously in the Colorado State Office, Bureau of Land Management, at 10 a.m., October 12, 1970, by F. M. Ricks, and by Arthur E. Meinhart and Irwin Rubenstein, respectively. Each offer was for the 50 percent mineral interest owned by the United States in the described lands. In a drawing to establish priority of consideration, offer C 11703, filed by Ricks, received priority. Ricks' offer was accompanied by the statement: "Offeror herein does not own an oil and gas lease on any part of these lands."

1/ The offers were filed for the 50% interest of the United States in SW 1/4 sec. 24, N 1/2 sec. 25, and NE 1/4, S 1/2 sec. 26, T. 10 S., R. 61 W., 6th P.M., Elbert County, Colorado.

Meinhart and Rubenstein protested issuance of a lease in response to the offer C 11703, contending that Ricks' statement was not in compliance with the pertinent regulation. 2/

By decision dated November 3, 1970, the Colorado State Office, concluded that the statement by offeror Ricks, while not identical with the language of the regulation, supra, is substantially in compliance therewith, and that it would be belaboring the issue to give the statement any construction other than that the offeror holds no interests in the mineral rights not owned by the United States in the acquired lands described in the lease offer. This appeal followed.

The appellants contend that Ricks' offer is defective in that he had not filed a statement showing the extent of his ownership

2/ 43 CFR 3130.4-4 Fractional present interests.

"An offer for a fractional present interest noncompetitive lease must be executed on a form approved by the Director and it must be accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease. Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than 50 percent of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such results will be rejected."

of the operating rights to the fractional mineral interest not owned by the United States, as required under the provision of the above-cited regulation.

Appellants argue that the holding in Merwin E. Liss, Cumberland & Allegheny Gas Company, 67 I.D. 385 (1960), [hereinafter referred to as "Liss"] and earlier cases therein cited, is governing in this case. Liss held that an acquired lands lease offer for land in which the United States owns only a fractional interest in the minerals is defective if it is not accompanied by a statement as to ownership of operating rights in the interest not owned by the United States, and the offer confers no priority upon an applicant until such time as the statement is filed. Appellants insist that offer C 11703 must be rejected for noncompliance with 43 CFR 3212.3(d), (recodified as 43 CFR 3130.4-4 (35 F.R. 9693, June 13, 1970)).

At the time the controversy in Liss arose the pertinent regulation required that an offeror had to show whether he owned the entire operating rights to the fractional mineral interest not owned by the United States in the tract covered by the offer to lease, and if not, the extent of offeror's ownership and the names

of other parties who own operating rights in such fractional interests. As Liss pointed out, this regulation asks only for information concerning operating rights and the response should be direct and specific. Failure by Liss to give such specific information compelled a holding in Liss that his offer was defective.

Here the offeror is required only to show whether he owns any operating rights in the nonfederal mineral interests in the lands. Under the amended regulation the offeror is not required to identify holders of outstanding interests. We agree with the determination by the State Office that the statement by Ricks, that the "Offeror * * * does not own an oil and gas lease on any part of these lands," is readily susceptible of the interpretation that he does not own any operating rights to the oil and gas therein.

In the field of oil and gas law, the terms "operating right," "operating interest," and "working interest" are synonymous. "Operating interest" has consistently been defined as "the mineral interest minus the royalty interest;" "an interest in oil and gas that is burdened with the cost of development and operation of the property." H. Williams and C. Meyers, Oil and Gas Law, Vol. 6 (1964). The operating interest is normally created by an oil and gas lease.

See United States v. Thomas, 329 F.2d 119 (9th Cir. 1964). Since an operating interest or right in the field of oil and gas is normally created by an oil and gas lease, and, absent any evidence to the contrary, it is reasonable to conclude that Ricks' statement, "Offeror herein does not own an oil and gas lease on any part of these lands," was intended to mean that he holds no interests in the oil and gas rights not owned by the United States, and accordingly satisfies the regulation set forth supra.

We think the following language setting forth the purpose of the regulation is noteworthy:

* * * Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than 50 percent of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such results will be rejected. 43 CFR 3130.4-4.

This is explanatory of the concern of the Department and the reason for the regulation. Where the issuance of the lease will invest the lessee with the federal interest of 50 percent or more, as is the situation here, it does not particularly matter, for the purposes of this regulation, whether he owns additional interests

in the tract or not; his other qualifications will be determinative of his right to receive the lease. So, whether Ricks had indicated he owned all, part or none of the operating rights to the nonfederal minerals, the same result would have ensued as his answer would not affect his right to receive the lease. Indeed, it has long been the practice of the Bureau of Land Management to accept, on appeal, the statement relative to the offeror's holding of nonfederal operating rights where the statement had not accompanied the offer, and to remand the case for appropriate action by the State Office. Cf., e.g., Gussie Rodsky, BLM-A 079982 (Miss.) (May 16, 1966). Here, where the offeror made a statement that he had no lease of the nonfederal mineral interest, a reasonable inference can be drawn that he intended to mean that he had no operating rights to such minerals. We hold that under the facts herein his statement satisfied the regulation, and that therefore there was no violation of the regulation under the doctrine of McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955).

Considering the practice by the Bureau since the Liss decision and the absence of any practical use for the requested information as to operating rights on the nonfederal minerals, we believe this

Department has no need now to follow Liss and that decision is overruled.

We find that the Colorado State Office correctly rejected lease offer C 11726 and dismissed the protest filed by Meinhart and Rubenstein against issuance of acquired lands oil and gas lease C 11703.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques, Member

We concur:

Edward W. Stuebing, Member

Anne Poindexter Lewis, Member

Frederick Fishman, Member

Newton Frishberg, Chairman

DISSENTING OPINION BY MR. RITVO

I would reverse the Colorado Land Office decision and return the case to it for adjudication of the Meinhart-Rubenstein offer.

The sole issue in the case is the interpretation of the regulation governing the mineral leasing of acquired lands. The pertinent provision reads:

An offer for a fractional present interest noncompetitive lease must be executed on a form approved by the Director and it must be accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease. Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than 50 percent of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such results will be rejected. 43 CFR 3130.4-4

The case turns upon the narrow issue of whether the statement by an applicant that he does not own a "mineral lease" or land is the equivalent of a statement that he does not own any "operating rights" in that land. As the majority decision recognizes, the Department held that it is not. Merwin E. Liss, 67 I.D. 385 (1960). There the regulation, 43 CFR 1954 ed. rev., 200.7, required, in addition to the one the current regulation asks for, a statement of the names of other parties who own operating rights in the

fractional interest not owned by the United States. One offeror stated that one such party owned a 25% interest in the oil and gas. Another offeror stated that the same party owned "the fee title to * * * 25% of the minerals" and that "it has issued no lease for the oil and gas deposits. * * *"

The Department held both statements deficient for the reason that the owner of a fractional interest in oil and gas deposits underlying a tract of land may dispose of the operating rights without divesting himself of his mineral interest or through some device other than a lease. It pointed out that the regulation required only a simple direct statement and that the response should be direct and specific. A response, it held, which leaves the Department to infer the answer it requested is not enough.

The majority opinion, while overruling Liss, does not point out wherein it is in error. It contents itself with an assertion that "normally" an operating interest is created by a mineral lease, and that absent any evidence to the contrary, it is reasonable to conclude that a statement that a person does not own a mineral lease is intended to mean that he does not own any interests in the oil and gas.

By relying on the "normal" situation the majority recognizes that there are situations in which one who does not own an oil and gas lease can own the operating rights. Thus, it acknowledges that Ricks' statement is not necessarily responsive to the mandatory requirement of the regulation and that there are situations in which one who owns the operating rights may not own an oil and gas lease. If, for example, Ricks owned the oil and gas rights, his statement that he did not own a lease would be technically accurate, yet it could be completely misleading as to his interest in the operating rights. That the regulation is mandatory is unquestioned. Liss, supra, and cases cited at 388; see also Arthur E. Meinhart, 6 IBLA 39 (1972). ^{1/}

The aside in the majority opinion that Ricks' statement would be defective if there were evidence that he had an interest in the operating rights highlights its inadequacy. There is nothing in the regulation to require any junior offeror to produce evidence that

^{1/} For other recent cases in which the Board has enforced a requirement made mandatory by similar language: see Duncan Miller, 10 IBLA 208 (1973); Apollo Drilling and Exploration, Inc., 10 IBLA 81 (1973); William Tate, 10 IBLA 78 (1973); James V. McGowen, 9 IBLA 133 (1973); Read and Stevens, Inc., 9 IBLA 67 (1973); James Monteleone, 9 IBLA 53 (1973); The Polumbus Corporation, 8 IBLA 84 (1972).

a recent offeror has in fact some ownership interest in operating rights when the latter's statement on its face does not exclude the possibility that he may have.

Since the regulation is mandatory, Ricks' offer did not earn priority until the defect was cured. The appellants, having filed a proper offer before then, are entitled to have their offer considered first and have a lease issued to them, if all else is regular. Arthur E. Meinhart, supra.

The majority also stresses that since the United States owns 75 percent of the mineral interest in the land applied for, nothing of consequence would flow from whatever interest or absence of interest Ricks had in the operating rights. This argument would be just as persuasive if Ricks had neglected to file any statement at all or if his statement had consisted of some even more irrelevant assertion than he actually made, for example that he owned no oil and gas rights in adjoining land. A mandatory requirement of a regulation ought not to be treated so cavalierly.

Finally, the reference to the past practice of the Bureau of Land Management is supported by citation of Gussie Rodsky, BLM-A

079982 (Miss.) (May 16, 1966). Rodsky and the cases it cited permitted the successful drawee at a drawing held to determine priority under the simultaneous filing procedure, who had not filed the required statement with his entry card-offer, to file one thereafter.

It is not clear whether the decision rests upon the conclusion that the simultaneous filing regulation did not plainly require that the statement be filed with the entry-card (see John J. King, A-30472, February 28, 1966), or that the failure to file the statement was of no importance because a lease could be issued to an offeror who had no interest in the operating rights so long as the United States owned a 50 percent or larger interest in the fractional mineral interest. Since we do not have an entry-card offer situation here, the first ground is inapplicable. The second, of course, is in complete disregard of a clear requirement of the regulation. I note that neither Rodsky, nor the cases it cites, refer to the Liss case. That decision then, does not help in the resolution of the problem presented by this appeal. 2/

2/ Rodsky also cites, without discussion, 43 CFR 1821.2-2, a regulation permitting the late filing of documents in certain situations. It is enough to point out that it is very doubtful that the late filing of a statement that is required to be filed with an entry-card can be waived in an entry-card drawing and it is plain that it cannot be relied upon in a conflict between two over-the-counter filings.

In my opinion, we are left with an offeror who failed to comply with a mandatory requirement of a regulation. The majority gives him priority over a junior offeror who filed a proper offer. This, I submit, is in error.

Martin Ritvo, Member

We concur:

Joan B. Thompson, Member

Joseph W. Goss, Member

